(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Town of Marblehead	)	CERCLA § 106(b) Petition No. 97-3
Docket No. I-96-1038	)	

[Decided June 27, 2002]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

TOWN OF MARBLEHEAD

CERCLA § 106(b) Petition No. 97-3

FINAL DECISION

Decided June 27, 2002

Syllabus

The Town of Marblehead, Massachusetts, acting by and through the Marblehead Municipal Water and Sewer Commission, and the Marblehead Municipal Light Department (collectively "Marblehead") seeks reimbursement of approximately $154,000 in costs expended for hazardous substance removal activities associated with a former railroad right-of-way located adjacent to the former site of the Chadwick Lead Mill ("the mill") in Marblehead and Salem, Massachusetts. The removal activities at the right-of-way were conducted pursuant to an Administrative Order on Consent for Removal Action ("AOC") negotiated and signed by Marblehead and the United States Environmental Protection Agency Region I (the "Region").

Marblehead acquired the right-of-way some thirty years ago in three separate parcels reflected in three deeds transferring ownership to the town. The first parcel was secured in 1968, by eminent domain. The second parcel, also acquired by eminent domain, was acquired in 1971 from the trustees in bankruptcy for the B&M Railroad. The third parcel was purchased by the Town in 1971. It is undisputed that lead contamination at the right-of-way pre-dates the town's ownership.

In its Petition, Marblehead maintains that it is not liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for the response costs it incurred in complying with the terms of the AOC. In particular, Marblehead argues that it is entitled to the third party defense under section 107(b)(3) of CERCLA.

Held: Marblehead has failed to meet its burden of establishing that it comes within the scope of the third party defense to liability under CERCLA § 107(b)(3) with regard to the portion of the right-of-way acquired by purchase in 1971. Although Marblehead, pursuant to CERCLA §§ 107(b)(3) and 101(35)(A), 42 U.S.C. §§ 9607(a)(3) and 9601(35)(A), might otherwise have a defense to liability with regard to those portions of the right-of-way acquired by eminent domain, by operation of joint and several liability Marblehead is liable for the reasonable costs of the removal action at the entire right-of-way.

The Board further holds that Marblehead has failed to meet its burden of establishing divisibility of harm in the matter at hand. In particular, Marblehead has failed to adduce timely and sufficient proof by which the Board could determine that there is a reasonable basis for distinguishing between the harm associated with the portion of the right-of-way for which Marblehead has direct liability from that associated with the remainder of the right-of-way. Moreover, the Petition offers no indication how the cleanup costs incurred at the right-of-way might be apportioned between the part of the right-of-way for which Marblehead is directly liable and the part for which it may have a defense. Accordingly, Marblehead's Petition is denied.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

On March 14, 1997, the Town of Marblehead, Massachusetts, acting by and through the Marblehead Municipal Water and Sewer Commission, and the Marblehead Municipal Light Department (collectively "Marblehead"), filed a petition for reimbursement with the Environmental Appeals Board pursuant to section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(2).[1] *See* Town of Marblehead's Verified Reimbursement Petition Regarding CERCLA Administrative Order on Consent for Removal Action ("Petition"). Marblehead seeks reimbursement of approximately $154,000 in costs expended for hazardous substance removal activities associated with a former railroad right-of-way located adjacent to the former site of the Chadwick Lead Mill ("the mill"), located off Lafayette Street in Marblehead and Salem, Massachusetts. *Id*. at 3. The removal activities at the right-of-way were conducted pursuant to an Administrative Order on Consent for Removal Action ("AOC") negotiated and signed by Marblehead and the United States Environmental Protection Agency Region I (the "Region"). *See*

[1]The authority to make determinations on petitions for reimbursement has been delegated by the President to the Administrator of EPA. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987). The authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b) has been further delegated to the Environmental Appeals Board. *See* EPA Delegation of Authority 14-27 ("Petitions for Reimbursement").

Exhibit ("Ex.") A to Petition. The sole basis for Marblehead's petition is that Marblehead is not liable under CERCLA for the response costs it incurred in complying with the terms of the AOC.[2]

The Region, along with EPA's Office of Site Remediation and Enforcement (the "Agency") filed a response on the merits to Marblehead's Petition on January 12, 2001. Memorandum in Opposition to the Town of Marblehead's Petition for Reimbursement Pursuant to 42 U.S.C. § 9606(B)(2)(A) ("Agency's Opposition") (Jan. 12, 2001). Marblehead filed a reply to the Agency's response on February 28, 2001. Town of Marblehead's Response to EPA Region I's Memorandum in Opposition to the Town of Marblehead's Petition for Reimbursement (Feb. 28, 2001) ("Marblehead's Response"). The Agency in turn filed a reply to Marblehead's Response on March 30, 2001. Reply to Town of

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[2]On May 20, 1997, the Region filed a motion to dismiss the petition for reimbursement. *See* U.S. Environmental Protection Agency Motion to Dismiss Petition for Reimbursement Without Regard to the Petition's Merits; Memorandum in Support of Motion to Dismiss Town of Marblehead's Petition for Reimbursement. According to the Region, Marblehead failed to meet the threshold eligibility requirements for seeking reimbursement under section 106(b). Memorandum in Support of Motion to Dismiss at 2. Specifically, the Region contended that a person seeking reimbursement under CERCLA § 106(b)(2) must have received a unilateral administrative order issued under section 106(a), and that Marblehead did not receive such an order from the Region but entered into a consent agreement with the Region. *Id.* at 8. According to the Region, the terms of the AOC demonstrate a settlement agreement between Marblehead and the Region, which Marblehead entered into willingly and for consideration from the Region in the form of a covenant not to sue, as well as contribution protection. *Id.* at 12. The Region asserted that the AOC is, thus, not the type of order contemplated by CERCLA § 106(b)(2), and that Marblehead's Petition must therefore be dismissed. In a later submission filed at the Board's request, the Region appears to have abandoned this argument and argues instead that "[w]here parties enter into voluntary agreements which provide for contribution protection and covenants not to sue, they implicitly waive their right to petition for reimbursement." Motion in Further Support of Motion to Dismiss Without Regard to Petition's Merits, at 5 (Jan. 12, 2001). The Region has failed to convince us that, by entering into the AOC, Marblehead impliedly waived its statutory right to seek reimbursement, particularly in the face of EPA's practice of securing *express* waivers of CERCLA section 106(b) reimbursement rights in the context of administrative orders on consent. *See* EPA's Model Administrative Order on Consent for Removal Actions (Mar. 16, 1993). The Region's motion to dismiss is therefore denied.

Marblehead's Response to EPA Region I's Memorandum in Opposition to the Town of Marblehead's Petition for Reimbursement Pursuant to 42 U.S.C. § 9606(B)(2)(A) (March 30, 2001). Finally, on September 10, 2001, Marblehead filed an addendum to its Response. Addendum to Town of Marblehead's Response to EPA Region I's Memorandum in Opposition to the Town of Marblehead's Petition for Reimbursement (September 10, 2001) ("Marblehead's Addendum").

On October 3, 2001, the Board issued a Preliminary Decision in which it proposed to deny Marblehead's Petition. Marblehead filed comments on the Preliminary Decision on November 5, 2001, and the Agency filed comments on November 30, 2001. In its comments, Marblehead attempts to adduce additional proof in the form of affidavits in support of its arguments. *See* Town of Marblehead's Motion to Submit Additional Evidence Responsive to Board's Preliminary Decision ("Marblehead's Motion to Supplement") (Nov. 5, 2001); Town of Marblehead's Comments in Response to Board's Preliminary Decision ("Marblehead's Comments") (Nov. 5, 2001). Of particular note, Marblehead would have the Board consider the following: (1) an affidavit of Dr. Lawrence Feldman, who Marblehead describes as a professional geologist "with extensive experience in environmental due diligence investigations" (Marblehead's Comments at 1 n.3); (2) the supplemental affidavit of Richard Bailey, a former employee of the Marblehead Light Department; and (3) the supplemental affidavit of Robert Jolly, Manager of Marblehead's Municipal Light Department. *See* Exs. A-C to Marblehead's Comments.

The comment process afforded by the Board's guidance for processing CERCLA Section 106(b)(3) petitions is not intended to serve as an occasion to start a fresh round of litigation based on evidence that could have been included in the petition itself; rather, it was intended to allow for identification of errors in the analysis contained in the preliminary decision. *See* Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions ("Revised Guidance") at 9 (EAB, Oct. 9, 1996) ("Comments should focus with particularity on the analysis in the Preliminary Decision * * *."). Indeed, to conclude otherwise would

bring substantial delay and inefficiency to the petition process and would reward the failure to file justiciable petitions.

In the interests of bringing efficiency and repose to these matters, the Board's guidance places great importance on the filing of complete petitions in the first instance:

> The Petition must articulate *all* legal arguments and *all* factual contentions (including contentions, if any, regarding technical or scientific matters) on which the petitioner relies in support of its claim for reimbursement. Except as may be permitted by the Board for good cause shown, and except as specifically provided in Sections III.B(4) and IV.F of this guidance (describing procedures for identifying and submitting cost-related information), no issues may be raised by a petitioner during the petition review process that were not identified in the petition, and *no evidence or information may be submitted during the petition review process that was not identified in the petition, unless the petitioner demonstrates*: (1) for new issues, that such issues were not reasonably ascertainable as of the date the petition was filed; or (*2) for new evidence or information, that the petitioner could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed.*
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> A complete copy of the administrative order on which the petitioner's claim is based must accompany the petition as an attachment. In addition, *all other documents on which the petitioner relies in support of its claim must also be submitted as attachments to the petition*, except for documents to be relied on solely as evidence of the costs incurred or as evidence of their reasonableness.

Revised Guidance at 5-6 (footnote omitted) (emphasis added). The Revised Guidance likewise envisions a high bar for the introduction of new claims, factual or otherwise, during the comment phase of the process:

> [T]he Board will, except in extraordinary circumstances, decline to consider any new claims or new issues sought to be raised during the comment period. Absent extraordinary circumstances, comments should therefore relate only to the issues raised in the petition or in the Region's response to the petition, or to any other matter discussed in the Preliminary Decision.

Id. at 9 (emphasis added). Waiting until the comment phase to introduce evidence, absent some compelling justification for its late arrival, is thus flatly inconsistent with the orderly process envisioned by the Revised Guidance.

In keeping with these principles, in the matters before us we have adhered to the view that, absent extraordinary circumstances, the Board will not consider new matters raised for the first time during the comment period. *See In re Port Auth. of N.Y. & N.J.*, CERCLA § 106(b) Pet. No. 96-5, slip op. at 44-45 (EAB, May 30, 2001), 10 E.A.D. ___; *In re Solutia, Inc.*, CERCLA § 106(b) Pet. No. 00-1, slip op. at 26 n.22 (EAB, Nov. 6. 2001), 10 E.A.D. ___.[3]

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[3]We note that the principle in our guidance disfavoring late-arriving evidence and arguments finds strong support in federal jurisprudence. In the federal courts, in view of "the compelling interest in the finality of litigation," *Lyons v. Jefferson Bank & Trust*, 793 F. Supp. 989, 991 (D. Colo. 1992), rules governing relitigation are "narrowly construed and strictly applied." *St. Paul Fire & Marine Ins. Co. v. Heath Fielding Ins. Broking Ltd.*, 976 F. Supp. 198, 202 (S.D.N.Y. 1996). Accordingly, in a variety of circumstances the courts have required a compelling justification for late-arriving evidence and have typically disregarded such proffers in the absence of such a justification. *See, e.g.*, *Webber v. Mefford*, 43 F.3d 1340, 1345 (10th Cir. 1994) (motion for reconsideration under Fed.R.Civ.P. 59 based on "newly discovered evidence" denied where movant failed to show that evidence was not available earlier and that diligent attempts had been made to secure the evidence); *Quaker State Oil Ref. Corp. v. Garrity*

(continued...)

In the case at hand, Marblehead attempts to reverse the orderly presentation of proof contemplated by our guidance. As discussed more fully below, the Petition itself is, in many important respects, largely conclusory in nature. Only in response to the Region's response to the Petition did Marblehead attempt to adduce proof in support of many of its arguments.[4] Now, some four years after its Petition was filed with the Board, Marblehead, without explanation, attempts for a third time to substantiate its case. With respect to the new evidence attached to its comments, Marblehead has not claimed that it "could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed," as contemplated by our guidance. Nor is it likely Marblehead could substantiate a claim in light of the fact that the evidence pertains to

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[3](...continued)
Oil Co., 884 F.2d 1510, 1518 (1st Cir. 1989) (motion to amend answer to state counterclaim denied where motion tardy and facts upon which proposed counterclaim was based "were known to defendant all along."); *Questrom v. Federated Dep't Stores, Inc.*, 192 F.R.D. 128, 131-32 (S.D.N.Y. 2000) (movant not given "a second bite at the apple" in effort to set aside judgment under Fed.R.Civ.P. 60(b)(2) based on new affidavits where movant could not show that evidence reflected in affidavits was "newly discovered," and where movant had known for months of the pendency of the argument ultimately accepted by the court, but had not submitted affidavits until after judgment was rendered against movant); *Becerra v. Asher*, 921 F. Supp. 1538, 1548-49 (S.D. Tex. 1996) (proper to reject affidavits submitted in support of motion for reconsideration under Fed.R.Civ.P. 59 when there was no demonstration of good cause or excuse for not submitting the affidavits timely), *aff'd on other grounds*, 105 F.3d 1042 (5th Cir. 1997); *Lyons v. Jefferson Bank & Trust*, 793 F. Supp. 989, 991 (D. Colo. 1992) (a motion to amend findings under Fed.R.Civ.P. 52 cannot be employed to introduce new evidence even where, "[b]lessed with the acuity of hindsight, [defendant] may now realize that it did not make its initial case as compelling as it might have") (quoting *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986)); *Butterman v. Walston & Co.*, 50 F.R.D. 189, 192 (E.D. Wis. 1970) (motion under Fed.R.Civ.P. 59 to vacate court's summary judgment because of new evidence denied where movants failed to aver "that they were unable to find [the new evidence] with due diligence previously").

[4]Indeed, arguably, the evidence adduced in Marblehead's response was itself untimely. In view of the fact that the Region has not objected to our consideration of that material, however, we have nonetheless considered it. Notably, the Region has objected to the evidence that Marblehead is attempting to introduce during the comment period, and with some cause.

historical matters which were undoubtedly discoverable before Marblehead filed its petition, and the fact that relevance or materiality of the evidence has been clear since the inception of this matter.

The legal issues to which Marblehead's new evidence relates – the third-party, innocent landowner, and divisibility of harm defenses (*see infra*) – either were or should have been manifest to Marblehead since the inception of this matter. The third-party and innocent landowner defenses are the very heart of Marblehead's petition. *See* Petition at 11-16. Moreover, the prospects for partial reimbursement by way of a divisibility argument have been or should have been apparent to Marblehead since the beginning of the case. The petition recognized that the three parcels that comprise the right-of-way were acquired through different means, with two of the parcels acquired by eminent domain and the other by outright purchase. *See* Petition at 5. That this distinction was significant in terms of the viability of Marblehead's defense was not only clear from the statute but also was apparent to Marblehead. *See* Petition at 17 ("*to the extent* the Town has acquired its interest in the railroad right-of-way by eminent domain, the innocent landowner defense applies whether or not the provisions of Section 101(35)(B) are satisfied.") (emphasis added); Marblehead's Response at 6 n.5 (the fact that two of the parcels were acquired through eminent domain "is significant because * * * CERCLA's innocent owner defense, 42 U.S.C. § 9601(35)(A), excludes from the definition of 'contractual relationship' in Section 107(b)(3) instruments transferring title where the 'Defendant is a governmental entity which acquired the facility * * * through the exercise of eminent domain authority * * *.'") and at 23 n.19 ("Region I appears to concede the applicability of this prong of the third party defense with respect to two of the parcels acquired by the Petitioner – excluding only the parcel purchased by the Petitioner * * *."). Under these circumstances, the potential that the Board would find Marblehead's defense viable with respect to some but not all of the parcels comprising the site was well within the range of foreseeable outcomes. Accordingly, if interested in partial recovery, Marblehead should have presented its evidence pertaining to divisibility in its petition, and certainly well before the comment phase of this proceeding. The case law in this area, discussed *infra*, should have provided

Marblehead with ample instruction regarding the nature of the proof required.

While there may be cases in which the issue of divisibility cannot reasonably be anticipated before the Board has rendered a preliminary decision, this case, in view of its facts, does not strike us as such a case. Marblehead, having made no effort to advance a basis for late introduction of the evidence, ignoring the admonition in the Revised Guidance that it do so, has given us no cause to conclude otherwise. Moreover, while the Board has on at least one occasion in the past allowed for an evidentiary hearing on the question of divisibility of harm, *see In re Southern Pacific Transportation Company & The Atchison, Topeka & Santa Fe Railway*, Reissued Order for an Evidentiary Hearing (EAB, May 23, 1996), that was under circumstances in which the issue of divisibility of harm was clearly framed in, and well-supported by, the petition itself. As discussed, in the case at hand, the issue of divisibility was neither clearly framed nor well-supported by the petition.

In view of Marblehead's failure to point to any exceptional circumstances that would support consideration of the new evidence propounded in Marblehead's Motion to Supplement, we decline to consider it. Rather, we will hold Marblehead to the evidentiary record developed prior to issuance of the Board's Preliminary Decision.[5]

After due consideration of the comments received and making such changes as are appropriate, the Board issues this Final Decision. *See* Revised Guidance at 9-11.

I. *BACKGROUND*

A. *Factual Background*

The Chadwick Led Mill, located on Lafayette Street in Marblehead and Salem, Massachusetts, was historically used as a lead manufacturing plant which specialized in producing high quality white

[5]Accordingly, the Board denies Marblehead's Motion to Supplement.

lead. Petition at 4. The Town of Marblehead owns a right-of-way adjacent to the site of the former mill, which was itself formerly owned and used for active rail transport by the Boston and Maine Railroad ("B&M"). AOC ¶¶ 6, 8. The Eastern Railway Company, the predecessor to B&M, acquired the property from the Chadwick Lead Works Corporation sometime in the late 1800s. Marblehead's Response at 2. *See also* Marblehead's Addendum at 2. Marblehead acquired the right-of-way some thirty years ago in three separate parcels reflected in three deeds transferring ownership to the town. *See* Petition at 5; *see also* Exs. C, D, E to Petition; Ex. 19 to Marblehead's Response. The first parcel was secured in 1968, allegedly by eminent domain.[6] Marblehead's Response at 6. According to Marblehead, this parcel comprises 70% of the right-of-way. *Id*. The Region does not dispute this figure. The second parcel, also allegedly acquired by eminent domain, was acquired in 1971 from the trustees in bankruptcy for the B&M Railroad. Petition at 5; Ex. D. Although Marblehead does not specify what portion of the right-of-way is comprised by this parcel, it would appear from the record before us that this parcel comprises approximately 15% of the right-of-way. *See* Ex. 4 to Marblehead's Response. Thus, together, the first two parcels comprise approximately 85% of the right-of-way. Marblehead's Response at 6; Ex. 4. The third parcel was purchased by the Town in 1971. Ex. E to Petition. The Agency has conceded that lead contamination at the right-of-way pre-dates the town's ownership. Agency Opposition at 10 n.5. The town proposed to use the right-of-way for a foot/bike path and a utility corridor.

In March 1996, at the request of the Massachusetts Department of Environmental Protection ("MADEP"), the Region became involved with the Lead Mill Site and right-of-way. Petition at 7. MADEP requested that the Region examine efforts to address the contamination at the right-of-way and Marblehead's plans for constructing an electrical conduit beneath the right-of-way. A preliminary assessment and site investigation conducted by the Region found elevated lead levels at the

[6]Apparently, Marblehead issued a notice of taking for this portion of the right-of-way in 1966, and executed the taking pursuant to a deed on July 19, 1968. *See* Marblehead's Response at 5-6; Ex. 19.

right-of-way ranging from 60 parts per million ("ppm") to 48,000 ppm. AOC ¶ 17 (Ex. A to Petition).

On May 2, 1996, representatives for Marblehead, MADEP, and the Region met to discuss Marblehead's plans for constructing an electrical conduit beneath the right-of-way. Agency Opposition at 6-7. Marblehead's representatives acknowledged that the project would involve digging in contaminated soil. *Id.* at 7; Affidavit of Ted Bazenas ("Bazenas Aff."),[7] Ex. 4 to [Region's] Memorandum in Support of Motion to Dismiss (May 20, 1997). The Region's representatives expressed concern that the work would involve an immediate hazard of exposure to lead-contaminated soils, and that proper handling of excavated soil would be necessary during the project. Bazenas Aff. at 2.

By letter dated May 29, 1996, the Region notified Marblehead of its status as a potentially responsible party ("PRP") with regard to lead contamination on the right-of-way. Ex. P to Petition. The letter stated that "[d]ue to the presence of hazardous substances at the Site, and in light of other conditions, EPA has determined that there may be an imminent and substantial endangerment to public health, welfare, or the environment." *Id.* at 2. By letter dated June 13, 1996, Marblehead denied liability under CERCLA, but indicated its willingness to work with the Region toward cleaning up the right-of-way. Petition at 8; Ex. R (Letter from Stephen D. Anderson to Ted Bazenas and Sharon C. Fennelly, Region I) (June 13, 1996). On July 16, 1996, the Region issued a draft unilateral order ("Draft UAO") (Ex. S to Petition) which prompted the negotiations that ultimately led to the August 8, 1996 AOC. Ex. A to Petition.

The AOC required that Marblehead conduct a removal action at the right-of-way. The AOC states, in part:

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[7]Ted Bazenas was the Region's On-Scene Coordinator. *See* 40 C.F.R. § 300.120 (On-Scene coordinators and remedial project managers: general responsibilities).

> A removal action at the Site would mitigate the potential threat of exposure at the Site. An appropriately designed and engineered cap for covering lead contaminated soil would abate the threat to bicycle and pedestrian traffic along the town-owned right-of-way portion of the Site. Impeding access to property adjacent to the capped right-of-way portion of the Site would mitigate the opportunity for exposure to neighboring contaminated property by users of the capped right-of-way corridor and reinforce the warning to bicycle and pedestrian traffic of the threats posed by adjacent property.

AOC ¶ 22. The requirements contained in the AOC pertain only to the right-of-way, and do not include the area on which the lead mill was located. It is undisputed that Marblehead has fully complied with the terms of the AOC. *See* Exs. B and V to Petition.

B. *Statutory Background*

CERCLA was enacted "to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties." *Dico, Inc. v. Diamond*, 35 F.3d 348 (8th Cir. 1994). Responsible parties are required to conduct, or contribute to the cost of, cleanups at sites where the release or potential release of a hazardous substance[8] threatens public health or welfare or the environment. Under the statute, the federal government may respond to a release or threatened release and then seek reimbursement from PRPs pursuant to CERCLA sections 104 and 107, 42 U.S.C. §§ 9604, 9607, or, where there may be an imminent and substantial threat of harm to the public health or welfare or the environment, the Federal government may order PRPs to respond to the threat pursuant to CERCLA § 106(a), 42

[8]The term "hazardous substance" includes any substance identified as a hazardous substance under CERCLA § 101(14) and any other substance identified as a hazardous substance by Agency regulation. *See* CERCLA § 102, 42 U.S.C. § 9602. A list of substances EPA has designated as hazardous substances appears at 40 C.F.R. § 302.4. There is no dispute that lead is a hazardous substance.

U.S.C. § 9606(a). Liable parties include the current owners of a facility. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).[9]

Petitions for reimbursement from the Hazardous Substance Trust Fund for reasonable response costs incurred pursuant to an Agency order are authorized by section 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). This subsection, which was added to CERCLA as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), provides that:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C) states that:

> [T]o obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section [107(a)] and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

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[9]The following three additional parties are liable under CERCLA § 107:

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances * * * and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities * * * from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance * * *.

CERCLA § 107(a), 42 U.S.C. § 9607(a).

As this section makes clear, in a 106(b) proceeding it is the petitioner that bears the burden of proof (including the burden of initially going forward with the evidence and the ultimate burden of persuasion). *See In re Chem-Nuclear Sys., Inc.*, 6 E.A.D. 445, 454 (EAB 1996). Thus, in order to establish that reimbursement is appropriate, Marblehead must prove by a preponderance of the evidence that it is not a liable party under § 107(a).[10]

Under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), the current owner of a facility is strictly liable for cleanup of hazardous substances on contaminated property whether or not the owner caused the contamination. *See In re Hemingway Transp., Inc.*, 993 F.2d 915, 921 (1st Cir. 1993), *cert. denied*, 510 U.S. 914 (1993); *In re Tamposi Family Invs.*, 6 E.A.D. 106, 109 (EAB 1995). Moreover, the liability that obtains under CERCLA is typically joint and several. Thus, in cases involving multiple PRPs, each PRP is potentially liable for the entire cost of response.[11] An exception to the application of joint and several

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[10]In addition, even if a party is liable under CERCLA § 107(a), it can obtain reimbursement of all or part of its costs to the extent it can prove that the Region's selection of the response action was "arbitrary and capricious or was otherwise not in accordance with law." CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D). Marblehead's petition, however, does not allege that the response action in this case was arbitrary and capricious.

A petitioner must also meet certain statutory prerequisites for obtaining review on the merits of a petition for reimbursement. These are: (1) that the petitioner received an administrative order issued under CERCLA § 106(a); (2) the petitioner complied with the order and completed the required action; (3) the petitioner submitted a petition for reimbursement within 60 days after completing the required action; and (4) the petitioner incurred costs. CERCLA § 106(b), 42 U.S.C. § 9606(b). As noted above, the Region initially asserted that Marblehead did not receive an administrative order in this case because the response costs resulted from an Administrative Order on Consent rather than a unilateral administrative order. *See supra* note 2. However, as previously stated, the Region appears to have abandoned this argument. *Id*. It is undisputed that Marblehead has satisfied the other prerequisites for obtaining review of its petition.

[11]Multiple PRP cases take a number of different forms. Many such cases involve multiple generators of hazardous substances whose materials were disposed of at a hazardous waste site. *See, e.g., United States v. Alcan Aluminum Corp*., 964 F.2d

(continued...)

liability obtains where a PRP can demonstrate that the environmental harm presented at a site is divisible[12] and that cleanup costs are capable

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[11](...continued)
252 (3rd Cir. 1992); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). In other cases, there are a series of PRPs in the chain of ownership or operation of the contaminated site. *See, e.g., Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, (4th Cir. 1999); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *New York v. Westwood-Squibb Pharm. Co., Inc.*, 138 F. Supp.2d 372 (W.D.N.Y. 2000); *Browning-Ferris Indus. of Ill. v. Ter Maat*, 13 F. Supp.2d 756 (N.D. Ill. 1998). *Cf. Horsehead Indus. Inc. v. Paramount Communications, Inc.*, 258 F.3d 132 (3d Cir. 2001); *United States v. Township of Brighton, Mich.*, 153 F.3d 307 (6th Cir. 1998). It is clear from the case law that the liability principles discussed in the text, including the principle of joint and several liability, apply with equal force in each of these contexts. *See, e.g., Axel Johnson*, 191 F.3d at 413-14; *Alcan Aluminum*, 964 F.2d at 268; *O'Neil*, 883 F.2d at 178-79; *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *Chem-Dyne*, 572 F. Supp. at 807-08; *Westwood-Squibb*, 138 F. Supp. 2d at 381. In the case before us, one PRP – Marblehead – was named in the Administrative Order giving rise to a reimbursement petition; however, it is plain that there are several PRPs associated with the right-of-way, including at least the following: Marblehead, Marblehead's predecessor in interest (the Railroad), and the Mill.

[12]As reflected in the case law, a PRP can attempt to demonstrate divisibility of harm in a number of different ways. For example, in some cases, PRPs attempt to demonstrate that certain cost-incurring cleanup activities were unrelated to the particular substance that they contributed to a contaminated site, and that the environmental problem at the site is therefore divisible. *See, e.g., Alcan Aluminum*, 964 F.2d at 267-71; *O'Neil*, 883 F.2d at 178; *Monsanto*, 858 F.2d at 169-71; *Axel Johnson*, 191 F.3d at 415-19*; Township of Brighton*, 153 F.3d at 317-18; *Westwood-Squibb*, 138 F. Supp.2d at 382-83. In other cases, more analogous to the matter at hand, PRPs attempt to show that the hazardous substance facility in question is geographically divisible, such that their liability is limited to that portion of the site with respect to which they are implicated. *See Chem-Nuclear Sys., Inc. v. Bush*, No. 01-5184, 2002 U.S. App. LEXIS 11144, at *14 (D.C. Cir. June 11, 2002); *United States v. 150 Acres of Land*, 204 F.3d 698, 707-09 (6th Cir. 2000); *Axel Johnson*, 191 F.3d at 417-18; *Akzo Coatings, Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1358 (N.D. Ind. 1996). We note in this regard that absent proof of such divisibility, the courts have traditionally declined to engage in subdividing sites for liability purposes. *See* Discussion, *infra*. Thus, a PRP having any liability for a part of a contaminated site is typically liable for the entire site. *See, e.g., 150 Acres of Land*, 204 F.3d at 709; *Axel Johnson*, 191 F.3d at 417-19; *Township of Brighton*, 153 F.3d at 313; *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3d Cir. 1993). *See also Akzo Coatings*, 960 F. Supp. at 1359-60; *N.W. Mut. Life Ins. Co. v. Atl. Research Corp.*, 847
(continued...)

of apportionment. *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). Significantly, the party seeking to avoid the imposition of joint and several responsibility has the burden of proving divisibility of harm as an affirmative defense. *See United States v. Mottolo*, 26 F.3d 261, 263 (1st Cir. 1994); *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988).

The statute provides in section 107(b) certain narrow defenses to the liability that otherwise obtains under section 107(a). Section 107(b) provides:

> There shall be no liability * * * for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by -
>
> ****
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant * * *, if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions[.]

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[12](...continued)
F. Supp. 389, 395-96 (E.D. Va. 1994).

CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). This defense is commonly referred to as the "third party defense." *See, e.g., Carter-Jones Lumber Co. v. Dixie Dist. Co.,* 166 F.3d 840, 845 (6th Cir. 1999).

Notably, the reach of the third party defense is limited by the statute's broad definition of "contractual relationship," which includes "land contracts, deeds, and other instruments transferring title or possession." CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A). In the landowner context, the Board has previously pointed out:

> Because of this broad definition, a landowner can have a "contractual relationship" with former owners in the property's chain of title, because the chain of deeds or other instruments transferring title creates an indirect contractual relationship between the owner and its predecessors in ownership.

In re Tamposi Family Invs., 6 E.A.D. 106, 110 (EAB 1995) (citations omitted).

Section 101(35) of the statute exempts from the definition of "contractual relationship," deeds and other instruments transferring title if the landowner acquired the contaminated property after the disposal or placement of the hazardous substance thereon, and if the landowner establishes one or more of the following by a preponderance of the evidence:

> (i) At the time the [landowner] acquired the [contaminated property] the [landowner] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the [property].
>
> (ii) The [landowner] is a government entity which acquired the [property] by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation. * * *

CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).[13] This provision establishes what is known as the "innocent landowner" defense. If a current owner in the chain of title can establish that either of these factors apply to its acquisition of the property, the owner will not be considered to be in a contractual relationship with the third party, and, if the owner meets the additional requirements of CERCLA § 107(a)(3),[14] can avoid liability.

Under the first prong of the defense, to establish that a landowner had "no reason to know" that the hazardous substance was disposed of on or at the property:

> [T]he [current landowner] must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the [current landowner], the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonable ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id. at § 101(35)(B), 42 U.S.C. § 9601(35)(B). Although the statute does not provide guidelines for determining what constitutes "good

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[13]CERCLA § 101(35)(A)(iii), 42 U.S.C. § 9601(35)(A)(iii), concerns the acquisition of property by inheritance or bequest, and is not applicable to this case.

[14]To qualify for the defense, the innocent purchaser must show that it "exercised due care with respect to the hazardous substance concerned," and "took precautions against foreseeable acts or omissions of [the third party causing the contamination] and the consequences that could foreseeably result from such acts or omissions." CERCLA § 107(b)(3)(a) - (b), 42 U.S.C. § 9607(b)(3)(a) - (b).

commercial or customary practice," or "commonly known or reasonably ascertainable information about the property," the legislative history of SARA provides some guidance in this regard. In particular, the legislative history indicates that any inquiry made by a current owner must be evaluated based on the standards existing at the time of purchase, and that such standards would evolve over time with the growth of public awareness of the dangers of hazardous substances:

> The duty to inquire under this provision shall be judged as of the time of acquisition. [Purchasers] shall be held to a higher standard as public awareness of the hazards associated with hazardous substance releases has grown * * *.
>
> Moreover, good commercial or customary practice with respect to inquiry in an effort to minimize liability shall mean that a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles.

H.R. Conf. Rep. No. 962, 99th Cong. 2d Sess., *reprinted in* 6 A Legislative History of the Superfund Amendments and Reauthorization Act of 1986, at 5003 (1990). Thus, in determining whether a purchaser conducted an "appropriate inquiry," a reviewing body must look to the specific facts surrounding the purchase and the standards existing at the time. *See HRW Sys. v. Wash. Gas Light Co.*, 823 F. Supp 318, 348 (D. Md. 1993) (standards to apply in analyzing the appropriateness of an owner's conduct must be those in effect at the time of the purchase)*; U.S. v. Pac. Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1348-49 (D. Idaho 1989) ("Congress used terms like 'appropriate' and 'reasonable' in describing the necessary inquiry. The choice of such terms indicates * * * that Congress was not laying down [a] bright line rule * * *. Rather, Congress recognized that each would be different and must be analyzed on its own facts."). As we stated in *In re Tamposi Family Invs.*, 6 E.A.D. 106 (EAB 1995):

> The absence of a contractual relationship with predecessors in the property's chain of title is

> established by showing that the landowner had "no reason to know" of the contamination; that showing is made by the owner having undertaken "all appropriate inquiry" prior to the acquisition [or where the property is acquired by a government entity through eminent domain] * * *. The degree of "appropriate inquiry" required depends upon when the property was acquired, and the circumstances under which it was acquired. Finally, the landowner must fulfill the remaining requirements of § 107(b)(3) by exercising "due care" with respect to the hazardous substance and taking "precautions" against the foreseeable acts of third parties with respect to the hazardous substance. CERCLA §§ 101(35)(A) & (B), and 107(b)(3). The statute makes clear that the landowner bears the burden of establishing all requisite elements of the "third party" defense by a preponderance of the evidence, including the factors determining whether the landowner is "innocent." *Id.*; *Wash. v. Time Oil Co.*, 687 F. Supp. 529, 531 (W.D. Wash. 1988) (defense under CERCLA § 107(b)(3) is affirmative defense, and landowner has the burden of establishing by a preponderance of the evidence that it is entitled to the defense).

Tamposi, 6 E.A.D. at 112-113.

II. *DISCUSSION*

Marblehead makes two main arguments with regard to liability. First, Marblehead argues that it is entitled to the third party defense under section 107(b)(3) of CERCLA whether or not it has satisfied the requirements of section 101(35). In particular, Marblehead asserts that although it is in the chain of title for the right-of-way, its contractual relationship (through the deeds transferring ownership of the right-of-way) with the lead mill – the party allegedly responsible for the presence of lead at the right-of-way – did not arise "in connection with" the activities at the right-of-way which gave rise to the lead contamination there. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). Thus, according

to Marblehead, it has a defense under section 107(b)(3) without reference to section 101(35). Second, Marblehead argues that, in any case, it satisfies the requirements for application of the innocent landowner defense. For the reasons set forth fully below, we conclude that both arguments must fail.

A. *"In Connection With" a Contractual Relationship*

For a landowner to sustain a third party defense under CERCLA § 107(b)(3) the landowner must prove that the contamination found on the property was caused solely by an act or omission of a third party, provided the act or omission of the third party causing the contamination on the property did not arise in connection with a direct or indirect contractual relationship with the owner and was not committed by an employee or agent of the landowner. If it did arise in either manner, the defense is unavailable.

Marblehead apparently concedes that it has at least an indirect contractual relationship with the lead mill by virtue of their common chain of title. This notwithstanding, Marblehead argues that the acts or omissions giving rise to the release of lead at the right-of-way were undertaken by the lead mill *after* the mill's transfer of the right-of-way to the railroad. Therefore, according to Marblehead, these were in effect the acts or omissions of an abutting property owner, disconnected from the chain of title through which Marblehead acquired ownership. Petition at 12; Marblehead's Response at 18-19.

In the abstract, Marblehead's argument has some force. If the sole cause of a release of hazardous substances at a site is the act of a predecessor in title undertaken *after* its transfer of the site property, it is difficult to see how the release-producing activity would be "in connection with" the contractual relationship between that party and its successors in interest. In such a circumstance, as Marblehead points out, the actions of the predecessor in title are indistinguishable from the actions of any other unrelated third-party.

Marblehead has failed, however, to sustain its argument in the context of this case. Indeed, in its September 10, 2001 Addendum,

Marblehead retreats from the factual premise that lead-related activities at the right-of-way post-dated the mill's transfer of the right-of-way to the railroad, conceding that such activities may well have occurred prior to the railroad's taking fee simple title to the right-of-way. Given this concession, Marblehead's argument necessarily fails.

Compounding Marblehead's problems with this line of argument is the fact that Marblehead's assumption that the mill was, in fact, solely responsible for the presence of lead at the right-of-way is altogether unsubstantiated by the Petition. Marblehead's Petition and Response offer no proof on this point and likewise fail to address whether its immediate predecessor in interest – the railroad – may also have had liability with respect to the presence of lead at the right-of-way.[15] To satisfy an essential element of the third party defense, provided in CERCLA §107(b), it must be shown that the release of the hazardous substance was "caused solely" by the third party. Absent such proof, the defense fails. In sum, Marblehead's argument that the lead contamination was attributable to an unrelated third party – akin to an abutting landowner not in Marblehead's chain of title – cannot stand. *See Tamposi*, 6 E.A.D. at 120 (failure to establish that predecessor in the chain of title did not contribute to the contamination by act or omission defeats the third party defense).

B. *Innocent Landowner Defense*

Marblehead asserts that it is excluded from CERCLA liability under the "innocent landowner" defense. As a general proposition, Marblehead asserts that it qualifies under the first prong of CERCLA

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[15]Marblehead does contend that the Region "does not dispute that the alleged lead contamination on the Right-Of-Way occurred *solely* as a result of actions by unrelated third parties – namely, the owners and operators of the former lead mill on the neighboring Mill Property." Petition at 16 (emphasis added). Based on our review of the record, it is far from clear to us that the Region has, in fact, conceded such a sweeping proposition. In any case, the Board is charged with independently determining whether a petitioner such as Marblehead has satisfied all elements of proof needed to substantiate a claim for reimbursement under CERCLA. In this instance, we conclude that Marblehead has not met its burden.

§ 101(35)(A) because it acquired the parcels constituting the right-of-way without knowledge of the latent hazards, having conducted an appropriate inquiry into the condition of the right-of-way prior to the acquisitions. Moreover, with respect to part, but not all, of the right-of-way, Marblehead asserts that the acquisition occurred through the exercise of eminent domain. To this extent, Marblehead attempts to avail itself of the second prong of CERCLA § 101(35)(A) as well. As explained below, it is the Board's conclusion that Marblehead has failed to establish by a preponderance of the evidence that "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by * * * an act or omission of a third party other * * * than one whose act or omission occurr[ed] in connection with a contractual relationship, existing directly or indirectly," with those responsible for lead contamination at the right-of-way. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). The Board concludes that while Marblehead did acquire part of the right-of-way by eminent domain and, thus, might otherwise have qualified for the defense for that portion of the right-of-way, the defense ultimately founders because we find Marblehead has failed to satisfy its burden of proving a basis for dividing the harm at the right-of-way between that portion for which Marblehead has direct liability (the property acquired by purchase) and that for which it does not (the property acquired by eminent domain).

1. *Parcels Acquired by Eminent Domain*

Marblehead contends that "to the extent the Town acquired its interest in the railroad right-of-way by eminent domain, the innocent [land]owner defense applies whether or not the provisions of [CERCLA] section 101(35)(B) are satisfied." Petition at 17. As previously discussed, pursuant to CERCLA § 101(35)(A)(ii), if indeed Marblehead acquired all of the right-of-way by eminent domain, it would be outside the definition of "contractual relationship" and therefore subject to the "innocent landowner" defense with regard to the entire right-of-way

(assuming Marblehead could satisfy the additional requirements of CERCLA § 107(b)(3)).[16]

As stated above, Marshall acquired the right-of-way in three separate parcels between 1968 and 1971. Marblehead states, and the Region apparently concedes,[17] that two of these parcels -- the one acquired in 1968, and the one acquired in 1971 from the trustees in bankruptcy for the B&M Railroad -- were acquired by eminent domain.[18] If this was the full extent of Marblehead's association with the right-of-way, it would thus appear that Marblehead could avail itself of the eminent domain prong of the innocent landowner defense. Unfortunately for Marblehead, however, it acquired another portion of the right-of-way by means other than eminent domain.

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[16]Because, as discussed below, we find that Marblehead falls within the definition of "contractual relationship" with respect to a portion of the right-of-way, we need not reach the question of whether Marblehead satisfies the additional requirements of CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3), and we decline the Agency's request in its comments on the Preliminary Decision that we do so. *See* EPA Region I's Comments Regarding the Board's Preliminary Decision Denying the Town of Marblehead's Petition Pursuant to 42 U.S.A. § 9606(B)(2)(A) (Nov. 30, 2001).

[17]*See* Reply to Town of Marblehead's Response to EPA Region I's Memorandum in Opposition to the Town of Marblehead's Petition for Reimbursement Pursuant to 42 U.S.C. § 9606(B)2)(A) (March 30, 2001) ("Region's Reply") at 3 n.1 ("The Town also relies on *the fact* that two of the three parcels which comprise the Site were acquired by eminent domain.") (emphasis added).

[18]With respect to one of the two eminent domain parcels, Marblehead makes the additional argument that the parcel is exempt from liability by virtue of CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D)(excluding from the definition of "owner or operator" a "unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."). Because we find that the parcel at issue here was acquired through eminent domain, we need not reach this issue.

2. *Parcel Acquired by Purchase*

In 1971, Marblehead acquired the remainder of the right-of-way by purchasing it outright.[19] *See* Ex. E to Petition. In this regard, according to the Petition, Marblehead cannot be considered to be in a "contractual relationship" with a third party because it did not know, and had no reason to know, that lead was disposed of at or on the right-of-way. Petition at 14-15. In support of this assertion, Marblehead maintains that, at the time it purchased the right-of-way, it undertook "all appropriate inquiry into the previous ownership of the property" consistent with the requirements of CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B). In particular, Marblehead states:

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[19]Although neither the Petition nor Marblehead's Response argues that Marblehead acquired this parcel by resort to the Town's eminent domain authority, Marblehead's Addendum filed on September 10, 2001, argues that we should treat the entire right-of-way as having been acquired by eminent domain, including the parcel purchased in 1971. *See* Marblehead's Addendum at 3 n.2. In support of this assertion, Marblehead cites to *City of Emeryville v. Elementis Pigments, Inc.*, 52 Env't Rep. Cas. (BNA) 1648, 1654-55 (N.D. Cal. 2001) for the proposition that a piece of property can be acquired "through the exercise of eminent domain authority" within the meaning of CERCLA § 101(35)(A)(ii), 42 U.S.C. § 9601(35)(A)(ii), even where the government entity "acquired several portions of the property through private negotiations without having initiated formal eminent domain proceedings." Marblehead's Addendum at 3 n.2.

While the court in *Emeryville* held that CERCLA does not require that a government entity have initiated formal eminent domain proceedings in order to have exercised its "eminent domain authority," the City in that case had, in fact, initiated the statutorily-required procedures for taking land by eminent domain under California law, although the City ultimately purchased the property at issue without filing an action in state court. *Emeryville*, 52 Env't Rep. Cas., at 1650. The court's decision was based, in large part, on the fact that California law "expressly contemplates government entities exercising their 'eminent domain authority' without resorting to litigation." *Id.* at 1655. In contrast, there is no evidence in the record before us indicating that Marblehead initiated any formal or informal eminent domain proceedings with regard to the parcel purchased in 1971. Indeed, in its earlier submissions, Marblehead appeared to concede that this parcel was acquired by direct purchase without resort to the Town's eminent domain authority. *See* Marblehead's Response at 23 & n.19. Further, there is no suggestion in the record before us that Massachusetts law is in any way similar to California law in this regard. *Emeryville* is therefore inapposite in the present context.

> [A]ppropriate inquiry into the previous ownership and uses of the property revealed that it had been a former railroad-right-of-way for at least 80-90 years. This inquiry was consistent with practices in effect at the time, which was long before CERCLA or any other potentially applicable environmental statute had been enacted. There is no evidence to suggest that any other factors listed in Section 101(35)(B) [are] triggered adversely with respect to the Petitioner's knowledge and activities at the time. The Petitioner cannot be charged with specialized knowledge and experience concerning lead contamination at the time; there is no evidence to suggest that the petitioner acquired the property at a purchase price that reflected a contaminated condition; it was not commonly known or reasonably ascertainable at the time of acquisition that the former railroad right-of-way itself was contaminated; there was nothing obvious about the presence or likely presence of contamination at the former railroad right of way when the Petitioner acquired it; and, there is nothing to suggest that the Petitioner had the ability to detect such contamination by appropriate inspection at the time. As such, the innocent landowner defense applies.

Petition at 15-16 (citations omitted).

Significantly, the Petition itself cites no record or other support to substantiate these conclusory assertions. Such support is clearly required to satisfy Marblehead's burden of establishing that the innocent landowner defense applies under the circumstances of this case. *See* CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C) (Petitioner bears the burden of proving it is not liable); Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions at 5 (Oct. 9, 1996), ("The Petition must articulate *all* legal arguments and *all* factual contentions (including contentions, if any, regarding technical or scientific matters) on which the petitioner relies in support of its claim for reimbursement."; burden of proof under CERCLA § 106(b)(2)(C) is on the petitioner) (emphasis

in original, footnote omitted), 61 Fed. Reg. 55,298, 55,299 (Oct. 25, 1996).

Marblehead's response to the Region's opposition to the Petition does, however, include an affidavit and provide some additional details in support of its assertion that the Town undertook "all appropriate inquiry" at the time of purchase, along with a supporting affidavit. *See* Town of Marblehead's Response to EPA Region I's Memorandum in Opposition to the Town of Marblehead's Petition for Reimbursement (Feb. 27, 2001) ("Marblehead's Response"). In particular, Marblehead states as follows:

(1) In July of 1965, Marblehead had one portion of the right-of-way appraised by a professional appraiser. Marblehead's Response at 4. Marblehead states that the appraiser inspected this parcel on three occasions and "did not note any concerns with respect to potential contamination on the Right-Of-Way (or the abutting Mill Property)." *Id.*; and

(2) In early 1968, a civil engineer employed by the Marblehead Municipal Light Department conducted a survey on the Mill Property and *a portion* of the right-of-way that the Town intended to acquire by eminent domain "to determine potential pole locations for an overhead transmission line that the Light Department planned to install." *Id*. at 5 (citation omitted). Later that same year, the Light Department removed railroad lines and ties from the right-of-way. *Id*. at 6. In late 1968 and 1969 the Light Department installed and then removed utility poles in response to neighborhood opposition. In 1969 the Light Department installed an underground transmission line along the route previously surveyed. According to Marblehead, Richard Bailey, then a line foreman for the Marblehead Light Department, observed these activities and confirmed that "during this work there was no indication of any lead contamination on the Right-Of-Way." *Id*. at 7 (citing Affidavit of Richard L. Bailey (Ex. 3 to Marblehead's Response)).

While these additional materials add further grist for consideration, they still, for the reasons stated below, fall short of satisfying Marblehead's burden of proving that it undertook "all

appropriate inquiry" with regard to its purchase of the final portion of the right-of-way in 1971. Because we are focusing for purposes of this discussion on the portion of the right-of-way acquired by direct purchase in 1971, any evidence proffered by Marblehead on this issue must relate to that portion of the right-of-way.

a. *1965 Appraisal*

According to Marblehead, an appraisal of the parcel purchased in 1971 was conducted in 1965. Marblehead's Response at 4. Thus, by Marblehead's own account, there was a six-year lapse of time between the appraisal and Marblehead's purchase of the parcel. Even assuming a reasonably thorough investigation by the appraiser in 1965, it does not appear to us that, given the potential for changes in the conditions of the parcel over the intervening six-year period,[20] reliance solely on the appraisal satisfies the requirement for an appropriate inquiry "at the time of acquisition" as required by CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B).

Further, as previously stated, the standards to apply in analyzing the appropriateness of an owner's inquiry into the condition of the property prior to purchase must be those in effect at the time of the purchase. In its Petition and Response, Marblehead has presented us with no evidence from which we could conclude that its actions were consistent with good commercial or customary practice at the time of purchase. Thus, because Marblehead has not demonstrated that its conduct was sufficient to meet the statutory requirements, Marblehead has failed to meet its burden in this regard.

[20]Because the innocent landowner defense turns on the absence of actual or constructive notice of site conditions at the time of purchase, and site conditions can change over time as a result of natural phenomenon, such as erosion and human activity, we do not regard Congress' inclusion of a contemporaneous inquiry requirement as either accidental or inconsequential.

b. *1968 Survey*

Marblehead states that in early 1968, a survey was conducted by a civil engineer working for the Marblehead Light Department "on and in the vicinity of the Mill Property *and a portion of the Right-Of-Way* to determine potential pole locations for an overhead transmission line that the Light Department wanted to install." Marblehead Response at 5 (emphasis added, citation omitted). Marblehead relies on the affidavit of Richard Bailey, then a line foreman for the Light Department, in which Mr. Bailey states that he accompanied the civil engineer and participated in activities related to the installation of utility lines. Ex. 3 to Marblehead's Response. Mr. Bailey states that he "did not observe any conditions that would indicate the presence of potential lead contamination on the right-of-way." *Id*. ¶ 9.

Upon review, we conclude that the 1968 survey suffers from the same flaws as the earlier appraisal. That is, the survey was not conducted at the time of the 1971 acquisition and, thus, does not satisfy the requirement that an appropriate inquiry be conducted "at the time of acquisition." In addition, in its Petition and Response Marblehead has failed to present sufficient evidence to establish that its actions were consistent with good commercial or customary practice at the time of purchase.[21]

Finally, we reject Marblehead's conclusory assertion that it cannot be charged with specialized knowledge or experience, as

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[21]We are not inclined to credit Mr. Bailey's recollection that he did not observe clay shards and other indications of contamination during his work at the right-of-way in 1968-69 with much weight. *See* Bailey Aff. ¶ 10 (Ex. 3 to Marblehead's Response). First, the record contains no contemporaneous notes of Mr. Bailey's observations. Rather, Mr. Bailey's affidavit, dated February 26, 2001, appears to be based solely on his recollections regarding the condition of the right-of-way more than 30 years earlier. We further question the reliability of his impressions in light of the fact that his reason for being at the right-of-way at that time, and apparently his sole focus while there, was not to inspect it or evaluate it for possible purchase, but rather was related to the installation of utility lines. We lack confidence that under such circumstances Mr. Bailey would have manifested the alertness to environmental conditions contemplated by the "all appropriate inquiry" requirement of section 101(35)(B).

contemplated by CERCLA Section 101(35)(B) ("[T]he court shall take into account any specialized knowledge or experience [of the party asserting the defense]."). Marblehead is a government entity with knowledge of, and access to, information regarding land use within its jurisdiction. As such, it does not strike us as at all inappropriate to hold Marblehead to a higher standard than ordinary citizens involved in real estate transactions. *See* H.R. Conf. Rep. No. 962, 99th Cong. 2d Sess., *reprinted in* 6 A Legislative History of the Superfund Amendments and Reauthorization Act of 1986, at 5003 (1990) (those engaged in commercial transactions are held to a higher standard than those engaged in private transactions). As a government entity, Marblehead had information at its disposal that should have put it on notice of the potential for lead contamination on the right-of-way. Indeed, it would appear that the information gathered by contractors (in relation to cleanup efforts) in the 1990s (including MyKroWaters Environmental Services, the contractor hired by the Town of Marblehead) regarding the historical use of the Lead Mill property, as well as the right-of-way, largely came from town records, many of which were presumably in existence in 1971.

Marblehead was, for example, surely aware that the right-of-way abutted a former lead mill. In addition, it seems appropriate to charge Marblehead with some understanding of historical industrial activity in the area, which included transportation of pig lead from a wharf in Salem harbor to the lead mill, apparently across portions of the right-of-way. *See* Removal Preliminary Assessment at 2 (Ex. N to Petition) (stating that "pig lead was moved from the ships to the facility in large crock-shaped clay pots. Presently, clay shards and pieces of lead are visible in several areas of the site.").

For the foregoing reasons, Marblehead has failed to prove the innocent landowner defense with respect to the portion of the right-of-way that it acquired by purchase. We now proceed to consider the extent of liability that flows from that preliminary conclusion.

C. *Has Marblehead Made a Case for Divisibility of Harm?*

CERCLA defines "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed,

or [has] otherwise come to be located." CERCLA § 101(9)(B), 42 U.S.C. § 9601(9)(B). This definition has been interpreted broadly to include "virtually any place where hazardous substances have been dumped or otherwise disposed of." *Northwestern Mut. Life Ins. Co. v. Atl. Research Corp.*, 847 F. Supp. 389, 395 (E.D. Va. 1994) (citing *United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985)); *La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1431 (E.D. Cal. 1993); *In re Port Auth. of N.Y. & N.J.*, CERCLA § 106(b) Petition No. 96-5, slip op. at 18-19 (EAB, May 30, 2001), 10 E.A.D. ___.[22] The scope of a facility under CERCLA is not contingent on property boundaries. *See Northwestern Mut. Life Ins.*, 847 F. Supp. at 395-96 ("What matters for purposes of defining the scope of the facility is where the hazardous substances were 'deposited, stored, disposed of, * * * or [have] otherwise come to be located.'") (quoting 42 U.S.C. § 9601(9) (alterations by District Court); *United States v. 150 Acres of Land*, 204 F.3d 698, 709 (6th Cir. 2000) (the fact that property is composed of "three cartographically-denominated parcels [does not] constitute[] a 'reasonable or natural' division into multiple parts.").[23]

Accordingly, courts have generally been reluctant to subdivide cleanup sites for purposes of assessing liability. *See United States v. Township of Brighton*, 153 F.3d 307, 312-13 (6th Cir. 1998) (rejecting argument that a parcel of property should have been separated by EPA into two parts - the part where the Township material was typically dumped consisting of three acres, and the rest of the fifteen-acre site which was contaminated with hazardous substances); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3d Cir. 1993) (holding an owner of less than 10% of the site jointly and severally liable for costs of cleaning up entire site under section 107(a)(1) of CERCLA); *150 Acres of Land*, 204 F.3d 698, 709 (6th Cir. 2000); *Akzo Coatings, Inc. v Aigner*

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[22]It is undisputed that the right-of-way meets the definition of a "facility."

[23]We note that the consent order signed by Marblehead and the Region treats the right-of-way as a single facility for purposes of the removal action. *See* Administrative Order on Consent for Removal Action (Ex. A to Petition) ¶ 23 (right-of-way is a "facility" pursuant to CERCLA § 101(9), 42 U.S.C. § 9601(9)).

Corp., 960 F. Supp. 1354, 1359 (N.D. Ind. 1996) (declining to separate site into separate facilities for purposes of liability).

In *Rohm & Haas*, for example, the defendant, who owned only a portion of the site at issue, argued "that EPA, when faced with a release involving several disparately owned properties, [should] define each property as a facility and bring multiple enforcement proceedings." *Rohm & Haas*, 2 F.3d at 1279. The Third Circuit rejected this argument, stating that "we think it evident from the broad statutory definition of 'facility' that Congress did not intend to be straight-jacketed in this manner in situations involving a release transcending property boundaries." *Id.*

Notwithstanding the courts' general reluctance to engage in subdivision of contaminated sites, a number of courts have recognized that such subdivision may be appropriate in circumstances in which a PRP can demonstrate divisibility of harm and apportionability of costs -- the traditional requirements for defeating the application of joint and several liability.[24] *See, e.g., Chem-Nuclear Sys., Inc. v. Bush*, No. 01-

[24]Courts have recognized that, in its absolute form, the joint and several liability that obtains under CERCLA can result in unfairness. *See Rohm & Haas*, 2 F.3d at 1279-80. Accordingly, as a means of mitigating this concern, the courts have also recognized that a liable party can avoid the joint and several liability that otherwise obtains upon a showing that the "harm is divisible and the [costs] are capable of some reasonable apportionment." *See, e.g., id*. at 1280 (quoting Restatement (Second) of Torts at 433A(a); *see also United States v. Township of Brighton*, 153 F.3d 307, 318-319 (6th Cir. 1998) (harsh effects of joint and several liability can be mitigated by divisibility); *Superfund Reauthorization: Judicial and Legal Issues: Hearing on P.L. 99-499 Before the House Subcomm. on Admin. Law and Gov'tal Relations of the Comm. on the Judiciary*, 99th Cong. (July 18, 1985) (statement of Lee M. Thomas, Adm'r, U.S. EPA) (liability under CERCLA "is strict, joint and several, unless the responsible parties can demonstrate that the harm is divisible."), *available on* West Law at A&P SARA Hearings (26) *13; *In re William H. Oliver*, 6 E.A.D. 85, 103 (EAB 1995) ("While liability under CERCLA § 107 is joint and several where there is a single harm, the case law also provides that where a liable party can establish that the harm is divisible and there is a reasonable basis for apportionment that apportionment of liability may be allowed.") (footnote omitted). Even when joint and several liability does apply, its effects can frequently be ameliorated through a contribution action brought against other PRPs. *See Rohm & Haas*, 2 F.3d at 1280-81 ("equitable factors are relevant in a contribution action

(continued...)

5184, 2002 U.S. App. LEXIS 11144, at *15 (D.C. Cir. June 11, 2002); *Akzo Coatings*, 960 F. Supp. at 1359; *Kamb v. United States Coast Guard*, 869 F. Supp. 793, 799 (N.D. Cal. 1999); *United States v. Broderick Inv. Co.*, 862 F.2d 272, 277 (D. Co. 1994). As the D.C. Circuit stated in *Chem-Nuclear*, however, proof of geographic divisibility is a "very difficult proposition." *Chem-Nuclear*, 2002 U.S. App. LEXIS 11144, at *20 (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)).

We have likewise observed that the party seeking apportionment bears the burden of proof, and the burden is a difficult one to meet.

> In order to warrant apportionment, a [liable party] cannot simply provide some basis on which damages may be divided up, but rather it must show that there is a '*reasonable* basis for determining the *contribution of each cause to a single harm*.' *United States v. Rohm and Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (emphasis in original). The burden, however, is on the liable party to make the requisite showing. *Id*. at 1280; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992). Courts have described this burden as "stringent," *O'Neil v. Picollo*, 883 F.2d 176, 183 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), and "substantial," *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992).

In re William H. Oliver, 6 E.A.D. 85, 103 (EAB 1995).

Marblehead has failed to prove divisibility of harm in the matter at hand. As stated above, it is undisputed that Marblehead acquired two

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[24](...continued)
* * * against other responsible parties"). *See also Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 415 (4th Cir. 1999)("Any inequity arising from the statute's strict liability scheme is, however, mitigated by the availability of contribution actions * * *."). It is unclear from the record before us whether Marblehead has a viable contribution claim against other PRPs associated with the right-of-way.

portions of the right-of-way by eminent domain. According to the record before us, the portions acquired by eminent domain amount to approximately 85% of the right-of-way. Marblehead's Response at 6; Ex. 4. The remainder, some 15% of the right-of-way, was acquired by purchase. But these facts alone are insufficient as a basis for finding divisibility of harm.

The Third Circuit's decision in *Rohm & Haas* is instructive in this regard. There, the issue before the court was whether an owner of approximately 10% of a hazardous waste cleanup site had made the case for divisibility of harm and apportionment of cleanup costs. In determining that the owner's proof fell short, the court observed as follows:

> [W]e decline to hold that simply showing that one owns only a portion of the facility in question is sufficient to warrant apportionment. In order to warrant apportionment, a defendant cannot simply provide some basis on which damages may be divided up, but rather it must show that there is a "reasonable basis for determining the contribution of each cause to a single harm." In other words, [the proponent of divisibility] must prove that there is a way to determine what portion of the "harm" (i.e., the hazardous substances present at the facility and the response costs incurred in dealing with them) is fairly attributable to [it], as opposed to other responsible parties. The fact that [the proponent of divisibility] only owns a portion of the site says nothing about what portion of the harm may fairly be attributed to it.

Rohm & Haas, 2 F.3d at 1280. *See also Chem-Nuclear*, 2002 U.S. App. LEXIS 11144, at *20 (rejecting geographic divisibility argument); *State of Arizona v. Motorola, Inc.*, 805 F.Supp. 749, 753 (D. Ariz. 1992)

(rejecting argument that the harm at a site should be apportioned according to the specific location where wastes were deposited).[25]

Here, just as in *Rohm & Haas*, in its Petition and Response, Marblehead has done nothing more than make a case that it has liability only for a portion of the right-of-way.[26] It is undisputed that, as a result of historical operations in and around the right-of-way, a hazardous substance came to be located on the entire right-of-way. Marblehead's Petition and Response offer no proof by which we could determine that there is a "reasonable basis" for distinguishing between the harm associated with the approximately 15% of the right-of-way for which Marblehead has direct liability from that associated with the remainder of the right-of-way. *See Motorola*, 805 F. Supp. at 753. Moreover, Marblehead's Petition and Response offer no indication how the cleanup

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[25]Defendants in *Motorola* asserted that their hazardous wastes were deposited at only one of two locations at a landfill, and that no commingling of refuse occurred between these two locations. *Motorola*, 805 F.Supp. at 752-53. Thus, according to defendants, they were only responsible for releases or threats of releases from one location. *Id.* at 753. The court rejected this divisibility argument, concluding that the defendants had failed to establish that the hazardous wastes they deposited at the site did not alone, or in combination with other wastes, contribute to the overall release or threat of release. *Id.* The court stated, in part:

> In light of the potential for commingling or migration of hazardous substances, the court cannot reasonably apportion liability without clear evidence disclosing the lack of, or lack of potential for, interaction of the substances deposited at any or all locations of the Landfill. Based on the submitted evidence, the Court cannot determine that defendants' substances never have, or never will, interact or react with other substances or never have or never will result in environmentally disastrous consequences. It also is not clear that defendants' wastes was physically isolated from all other waste, that it never interacted with, or never will interact with, any other waste during a release or threatened release, to create any environmental harm.

Id.

[26]Indeed, Marblehead's Petition and Response do not even expressly invoke the concept of divisibility of harm by name.

costs incurred at the right-of-way might be apportioned between the part of the right-of-way for which Marblehead is directly liable and the part for which it has a defense. This clearly was Marblehead's burden to carry, and Marblehead's petition just as clearly falls short of meeting this burden. *See, e.g., Northwestern Mut. Life Ins. Co. v. Atl. Research Corp.*, 847 F. Supp. 389, 395 (E.D. Va. 1994) (that the defendant leased only a portion of the property is immaterial in defining the scope of the facility); *United States v. Township of Brighton*, 153 F.3d 307, 312-13 (6th Cir. 1998) (rejecting argument that a parcel of property should have been separated by EPA into two parts).

Indeed, Marblehead's showing in the case at hand falls short even of the circumstantial case for divisibility recently found insufficient by the D.C. Circuit in *Chem-Nuclear*, 2002 U.S. App. LEXIS 11144. In that case, the Court stated, in part:

> [A] polluter [may] escape joint-and-several liability for the entire harm only "if it can meet its burden of proving the amount of the harm that it caused. If it is unable to do so, it is liable for the full amount of the harm." *Bell Petroleum Servs., Inc. v. Sequa Corp.*, 3 F.3d 889, 896 (5th Cir. 1993) (citing Restatement (Second) of Torts § 433B(2)).
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> [W]hile [Appellant] produces some circumstantial evidence to support its theory of geographic divisibility, it has not managed the "very difficult proposition" of proving its theory by a preponderance of the evidence.

Chem-Nuclear, 2002 U.S. App. LEXIS 11144, at *17, *21.

III. *CONCLUSION*

Accordingly, the Board concludes that because Marblehead has failed to establish by a preponderance of the evidence that it has a defense with respect to part of the right-of-way, and, because it has not

shown a basis for divisibility of harm, by operation of joint and several liability Marblehead is liable for the reasonable costs of the removal action at the entire right-of-way. Marblehead's Petition is therefore denied.

So ordered.